NOTES

THE STATUS OF FARMERS' CO-OPERATIVE ASSOCIATIONS UNDER FEDERAL LAW

From the beginning of federal regulation of combination there has been an insistent demand on the part of the farmers for the exemption of their organizations. The political history of the past thirty years is full of party promises to the farmers, but the laws on the statute books reveal a rather niggardly performance of the promises made.

In 1890, during the course of the debates on the Sherman Act, the question was raised whether the Act should be applied to labor and agricultural organizations. Senator Sherman introduced at that time, the following amendment in the form of a proviso:

> Provided, that this Act shall not be construed to apply to any arrangements, agreements, or combinations between laborers, made with a view of lessening the number of hours of their labor, or of increasing their wages, nor to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the prices of their own agricultural or horticultural products.

This same amendment was offered later by Senator Aldrich. On March 27, 1890, the bill was recommitted to the Judiciary Committee, and on April 2 it was reported out completely changed in its form and provisions. The exemption clause, which had been attached to the bill by amendment before the recommittal of the bill to the Committee, was eliminated from the measure by the Committee and this action afterward confirmed by the Senate.[1] So far as the legislative history of the Act is concerned, therefore, the intention of Congress not to exempt farmers and their organizations from the broad prohibitions of the statute is clear.

The Supreme Court in its interpretation of the Sherman Law, has vigorously upheld and enforced the intention of the framers of the law. In the case of *Loewe* v. *Lawlor*, 208 U.S., 274, page 301, Chief Justice Fuller, in discussing the scope of the Act, said:

> The Act made no distinction between classes. It provided that "every" contract, combination, or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the Act, and that all these efforts failed, so that the Act remained as we have it before us.

[1] *Congressional Record*, Sixty-third Congress, Second Session, p. 13908.

In *United States* v. *King*, 250 Fed., 908 (1916), the members of the Aroostook Shippers' Association, shipping 75 per cent of the potatoes produced in Aroostook County, Maine, were indicted for conspiracy in restraint of trade. It was alleged that the Association maintained a listing committee who blacklisted customers, without hearing, for what it considered unreasonable failure to pay money lawfully due, unreasonable failure to accept and pay for potatoes duly shipped, and any member or outside dealer dealing with such a blacklisted customer was in turn himself blacklisted. A demurrer to the indictment was overruled, the court holding that the action of this Association constituted a restraint of trade within the meaning of the Sherman Law. So far as the Sherman Law itself is concerned, there can be no doubt that farmers' organizations are in no degree exempted.

In 1914, the Clayton Act, supplementing the existing anti-trust legislation, was enacted. At this time the farmers were powerfully organized, several million of them being represented in organizations at Washington. The labor organizations of the country were still better organized. The political influence of these two great classes resulted in the insertion of several provisions in the Clayton Act. Section 6, the enactment of which was considered a triumph for the farmer and labor forces of the country, reads as follows:

> SEC. 6. That the labor of a human being is not a commodity, or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural associations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organization from lawfully carrying out the legitimate objects thereof; nor shall such organization, or the members thereof, be held or constructed to be illegal combinations or conspiracies in the restraint of trade, under the anti-trust laws.

This section, however, in the last analysis was an empty victory. Its sole effect, so far as farmers' organizations were concerned, was to establish the legality of such organizations per se so that they could not be dissolved if they were truly co-operative organizations instituted for the purpose of mutual help, without capital stock, and if they were not conducted for profit. The section was so drawn that such an organization or its members committing acts of a character violating the anti-trust acts remained liable to the penalties of these laws.

The legislative history of the section demonstrates beyond doubt, that this was the intention of Congress. As originally introduced, April 14, 1914, the present section reads as follows:

SECTION 6. That nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers', agricultural, or horticultural organizations, orders, or associations operating under the lodge system, instituted for the purposes of mutual help, and not having capital stock, or conducted for profit, or to forbid or restrain individual members of such orders or associations from carrying out the legitimate objects of such associations.

The House Committee, in reporting the bill, May 6, 1914, struck out the entire measure, substituting a new bill in which Section 6 appeared as Section 7, with certain minor changes in wording, immaterial for the purpose of this article. An amendment was offered in the House proposing to strike out the first paragraph of Section 7 and insert in lieu thereof the following:

The provisions of the anti-trust laws shall not apply to agricultural, labor, consumers', fraternal, or horticultural organizations, orders, or associations.[1]

This amendment was rejected. The House, however, before passing the measure did add the following clause, as an amendment:

Nor shall such organizations, orders or associations, or members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws.[2]

The bill when introduced in the Senate was referred to the Senate Committee on the Judiciary and was reported out of committee July 22, 1914, in an amended form in which the words "consumers," "orders," and "associations" were stricken out wherever appearing in the section, and the word "lawfully" was inserted before the phrase "carrying out the legitimate objects thereof." The Committee amendments were adopted by the Senate, together with a further amendment declaring that the labor of a human being is not a commodity or article of commerce.[3] No changes were made in the section while the bill was in conference and the section as finally passed read as shown above.

These Committee reports likewise show the intention of Congress to legalize the organization of such associations so as to protect them against dissolution but not to legalize acts committed by them of a character heretofore held unlawful under federal statutes. The majority report of the House Committee on the Judiciary contains the following statement with reference to this section:

In the light of previous decisions of the court and in view of the possible interpretation of the law which would empower the court to order the dissolution of such organizations and associations, your committee feels that all

[1] *Congressional Record*, Sixty-third Congress, Second Session, p. 9569.

[2] *Ibid.*, pp. 9538-69.

[3] *Ibid.*, pp. 13918, 13963-64, 13964-83, 14010-28, 14590-91, 14597.

doubts should be removed as to the legality of the existence and operation of these organizations and associations, and that the law should not be construed in such a way as to authorize the dissolution by the court under the anti-trust laws or to forbid the individual members of such associations from carrying out the legitimate and lawful object of their association.[1]

In discussing the first paragraph of this section, the minority of the committee in this report also said:

The majority of the committee, in its report, explains the purpose of this paragraph to be to make certain that the Sherman Anti-trust Act does not "warrant the court under interpretations heretofore given to that law to enter a decree for the dissolution of such organizations." If this is the correct interpretation of this paragraph it will merely prevent suits for the dissolution of labor organizations, but will permit the taking out of injunctions under the Sherman Anti-trust Act against labor organizations to restrain them from carrying out their purposes, and the bringing of suits for triple damages against them under that Act.

This paragraph applies only to organizations "instituted for the purposes of mutual help, and not having capital stock or conducted for profit." We cannot be entirely certain that all labor unions will be held to be conducted "for their purposes of mutual help" and as being not "conducted for profit." There can be no doubt that as to "consumers, agricultural, or horticultural" organizations this limitation is a fatal defect. Every organization of farmers which aims to co-operatively bargain as to the products of its members is "conducted for profit," and many of them have "capital stock." The only sort of farmers' organizations which this section sanctions is one which does nothing more than to discuss better agricultural methods. As soon as farmers combine to get better prices for their products, or to sell directly to consumers, this paragraph affords them no relief from the anti-trust laws.

The debates in the House and Senate corroborate this interpretation of the section. Chairman Webb of the House Judiciary Committee, who was in charge of the measure, in the course of the debate, pointed out the possible danger of a corner of the wheat or cotton crop by a farmer organization and stated most emphatically that any such organization to monopolize any product in this country ought to come within the prohibition of the Sherman Anti-trust Laws.[2]

Congressman Towner in the debate stated the purpose of the section to be as follows:

Any association of the classes mentioned, or any member who violates the anti-trust laws, will be liable to their penalties the same as any other association or person. It is merely provided that the organization or legitimate

[1] *House Report No. 627*, Sixty-third Congress, Second Session, p. 16.

[2] *Congressional Record*, Sixty-third Congress, Second Session, p. 9571.

operation of such associations shall not be held to be within the prohibitions of the statute.[1]

In the Senate, Senator Jones, discussing the section said:

Nor does this proposed Section 7 make acts done by some organization legal which if done by other organizations would be illegal. It does not permit these organizations to commit acts in undue restraint of trade which would be prohibitive to other organizations. . . . . While I think that probably all that this provision does with reference to farmers' organizations is to recognize their legal existence purely for mutual help, yet if they go out and by combinations with reference to their commodities violate the Sherman Law, like other instrumentalities, they will be subject to the law just the same. . . . . It may be—and this is the point I want to call the attention of the chairman of the Committee to—that for such acts an organization could now be dissolved while after the passage of this provision, it might not be; but even if this is so, it could be restrained from doing the unlawful act and then there could be no objection to continuance as an organization.[2]

Senator Cummins, one of the ablest lawyers in the Senate, in the course of the debate defined the scope of the section in this language:

I think the word "lawfully" which has been reported by the Committee, and, I understand, is now before the Senate for rejection or adoption, limits the activities or acts or doings of any such association to just such as are now authorized by the law.[3]

Senator Thomas, in a lengthy speech on the purposes of the section said:

The fact of existence, their status, in other words, is fixed by this section and in so far as their objects are legitimate and in the pursuit of them legitimate measures are used, there can be no conflict with the anti-trust laws. The same thing may be said of corporations great and small. But beyond that, Mr. President, this section does not go. The thing itself is legalized. Whether it comes under the provision of the anti-trust law depends upon its future conduct, which may or may not be offensive to those statutes. . . . . Therefore, with reference to this branch of the subject I may summarize the situation by the statement that Section 7 makes, so far as the anti-trust laws are concerned all labor and agricultural associations lawful and endows them with power, if they did not have it before, of carrying out in a lawful manner the legitmate purposes and objects of their organization, but they may nevertheless so act as to violate the law, just as corporations or individuals may violate it by conduct which brings them within its prohibition.[4]

In *United States* v. *King*, 250 Fed., 908 (1916) upon the facts already recited in this article, the Aroostook Potato Shippers' Association was indicted for a combination or conspiracy in restraint of trade under

[1] *Congressional Record*, Sixty-third Congress, Second Session, p. 9547.

[2] *Ibid.*, pp. 14012, 14014, 14017.

[3] *Ibid.*, p. 14018.

[4] *Ibid.*, pp. 14021, 15266.

the Sherman Law. The defense set up was that the defendant was an agricultural organization within the meaning of Section 6 of the Clayton Act and a demurrer was filed to the indictment. The court after holding that the indictment did not show the organization to be an agricultural one and was therefore beyond any doubt not demurrable said on page 910:

> Even if it were so, I do not think that the coercion of outsiders by a secondary boycott, which was discussed in my opinion on the former indictment, can be held to be a lawful carrying out of the legitimate objects of such an association. That act means, as I understand it, that organizations such as it describes are not to be dissolved and broken up as illegal, nor held to be conspiracies in restraint of trade; but they are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations.

The Supreme Court in interpreting the section as it applies to labor organizations which as already noted are given the identical exemption, has adopted the principle stated in the preceding case. These decisions are of course of equal weight in determining the rights of farmers' organizations under the section.

In *Duplex Printing Company* v. *Deering* decided by the Supreme Court on January 3 of this year, the Circuit Court of Appeals had held that under Section 20 of this Act, perhaps in conjunction with Section 6, there could be no injunction against the defendants who were maintaining both a primary and secondary boycott against the printing company. In denying the contention of the defendant and discussing Section 6, the Supreme Court by Justice Pitney employed the following language:

> As to Section 6, it seems to us its principal importance in this discussion is for what it does *not* authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be constructed to forbid the existence and operation of such organizations or to forbid their members from *lawfully* carrying out their *legitimate* objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws.

In the earlier case of *Paine Lumber Company* v. *Neal*, 244 U.S., 459 (1915), a case only indirectly involving the Clayton Act, Justice Pitney in his dissenting opinion incidentally stated his views as to the purpose of Section 6 in the following vigorous language:

> The suggestion, in behalf of the defendant, that Section 6 of the Clayton Act established a policy inconsistent with relief by injunction in such a case as the present, by making legitimate an act or practices of labor organizations or their members that were unlawful before, is wholly inadmissible. The section prohibits restraining members of such organizations from "carrying out the *legitimate* object thereof." What these are is indicated by the qualifying words: "instituted for the purposes of mutual help, and not having capital stock or conducted for profit." But these are protected only when "lawfully carried out." The section safeguards these organizations while pursuing their *legitimate* objects by *lawful* means, and prevents them from being considered, merely because organized, to be illegal combinations or conspiracies in restraint of trade. The section, fairly construed, has no other or further intent or meaning. A reference to the legislative history of the measure confirms it. *House Report No. 627*, Sixty-third Congress, Second Session, pp. 2, 14-16; *Senate Report No. 698*, Sixty-third Congress, Second Session, pp. 1, 10, 46.
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> Neither in the language of the section nor in the Committee report is there any indication of a purpose to render lawful or legitimate anything that before the Act was unlawful whether in the object of such an organization or its members or in the measures adopted for accomplishing them. . . . .
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> And the suggestion that, before the Clayton Act, unlawful practices of this kind were usually and notoriously resorted to by labor unions, and that for this reason Congress must have intended to describe them as "legitimate objects" and thus render lawful what before was unlawful, is a libel upon the labor organizations and a serious impeachment of Congress.

While the efforts to bring about directly a modification of the statutory law as it applies to farmers' organizations have brought no substantial results, these organizations have been more successful in their efforts to make difficult the execution of the law. In the Sundry Civil Appropriations Act of 1914, 38 Stat. at Large Part 1, page 53, making appropriations to the Department of Justice, they succeeded in securing the inclusion of the following proviso, which has been re-enacted in this Act each year:

> Provided further, that no part of this appropriation shall be expended for the prosecution of producers of farm products and associations of farmers who co-operate and organize in an effort to and for the purpose to obtain a fair and reasonable price for their products.

The Act containing this proviso had been previously vetoed by President Taft on March 4, 1913.[1]

[1] *Congressional Record*, Sixty-second Congress, Third Session, p. 4838.

Here is an indirect but very substantial exemption of farmer organizations. To come within the meaning of this provision, such an organization would unquestionably have to be a bona fide association of farmers and it would have to be organized for the purpose of obtaining and maintaining a fair and reasonable price for their products. Prior to the enactment of this proviso, it was well settled under the anti-trust acts that the fairness and reasonableness of a price charged by a monopoly or combination in restraint of trade was not a legal justification. This rule was very definitely laid down in *United States* v. *Standard Oil Company*, 173 Fed., 177, 195, and also in *United States* v. *Eastman Kodak Company.*, 226 Fed., 62, 79. In the latter case, the court said:

> Whatever reduction the Eastman Kodak Company may have made as to price, on portions of the photographic paper or other materials sold by them, does not compensate for the suppression of competition in the industry as a whole, and it is no justification of an illegal monopoly to assert that it has reduced the price of an article produced by it, as this may have been done simply to injure a rival.

The Attorney-General of the United States in his application of September 30, 1919, to the Federal Trade Commission asking an investigation by the Commission, under the provision of Section 6-E of the Federal Trade Commission Act, of the organization, management, and conduct of business of the California Associated Raisin Company, interpreted this provision as prescribing a limitation upon the Department of Justice making necessary an investigation as to whether or not the Association in question was combining to maintain more than fair and reasonable prices for its product. This prohibition, therefore, operates in practical effect to prohibit action by the Department of Justice when the facts show the only purpose of such an organization is to secure a reasonable price and unreasonable prices are not obtained by it. Thus indirectly, by a joker in an appropriation act, a vague regulation of the prices of the products of farm organizations is effected and an entirely new principle injected into the regulation of industrial organizations as contrasted with public utilities. The test of unreasonableness is applied to the products of farm organizations in much the same way it is applied to rates of common carriers under the Act to regulate interstate commerce. But the determination of reasonableness rests solely within the discretion of the attorney-general and the means of enforcement is solely the threat of legal prosecution. This provision, however, does not in any way affect the private right of action of an individual injured by an organization of farmers operating in restraint of trade, and it is doubtful whether its wording would protect an

organization which was engaging in practices admittedly in violation of the anti-trust laws even if such an organization were not charging unreasonable prices.

At any rate, dissatisfied with the existing status of the law, the farmers' organizations of the country are now endeavoring to procure the passage by Congress of a bill legalizing co-operative farmer organizations for mutual benefit, provided no member is allowed more than one vote and provided the association does not pay dividends on stock or membership capital in excess of 8 per cent per annum. It is now proposed in this measure to grant to the Federal Trade Commission, if it has reason to believe any such association restrains trade or lessens competition to such an extent as to cause an undue enhancement of price of any agricultural product, the power to issue complaint, hold hearings, and ascertain the facts. If it be the opinion of the Commission that such action does unduly enhance prices, it may order the organization to cease and desist from such activity. Appeal to the district court in which the association has its principal place of business is provided for. This measure, as at present worded, expressly provides that nothing therein contained shall be construed to authorize any attempt to create a monopoly or to exempt such organization from the provision of the Federal Trade Commission Act prohibiting unfair methods of competition. This act, if enacted, therefore, would not legalize a monopoly or an attempt to create a monopoly. It would not permit the use of unfair methods of competition, but it would permit the combination of farmers into co-operative organizations and it would permit such organizations to voluntarily restrain competition among their members, provided in so doing they would not unduly enhance prices. In view of the pledges of both parties in the last campaign, the passage of some legislation of this general character appears certain within the next few months.

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NEW PHASES OF THE CLASSIFIED PROPERTY TAX

The recent session of the legislature of Nebraska has added a new chapter to the history of the vexed problem of taxing "intangible" property. Prior to that session such property was dealt with under a general property tax of the less liberal sort, and with the usual results, frequent failure to list such property and gross inequalities of the tax burden when it was listed. Ten years ago, when the question of a better means of supplying "farm credit" was being much agitated, the